

FILED BY CLERK

MAY 19 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0322-PR
	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
EDEL PAEZ IBARRA,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074161

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

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Isabel G. Garcia, Pima County Legal Defender  
By Stephan J. McCaffery

Tucson  
Attorneys for Petitioner

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E S P I N O S A, Presiding Judge.

¶1 After a jury trial, petitioner Edel Paez Ibarra was convicted of transporting marijuana for sale. The trial court sentenced him to a mitigated prison term of three years. This court affirmed the conviction and sentence on appeal after Ibarra's court-appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967).

*State v. Ibarra*, No. 2 CA-CR 2008-0392 (memorandum decision filed Aug. 6, 2009). Ibarra then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting trial counsel had rendered ineffective assistance. The trial court denied relief without an evidentiary hearing, and Ibarra seeks review of that decision. Unless a trial court has abused its discretion in determining whether post-conviction relief is warranted, we will not disturb its ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶3 In his petition, Ibarra contended trial counsel had been ineffective because he had not objected to improper drug-courier profile evidence. *See State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998). That evidence included the testimony of two Pima

County Sheriff's deputies about drug smuggling and the process of setting up a "heat" car and a "load" car. According to the officers, the "heat" car attempts to draw law enforcement officers' attention away from the "load" car, which is carrying the drugs, by committing a traffic violation. The state relied on this evidence to establish a connection between Ibarra, who was allegedly a passenger in the "heat" car, and the car in which the drugs were found. Ibarra argued counsel's performance was prejudicial because without this testimony there would have been little persuasive evidence establishing he had assisted in the transportation of the drugs.

¶4 Denying the petition without an evidentiary hearing, the trial court noted counsel had objected to the testimony for lack of foundation qualifying the officers as experts. The court further noted it had sustained that objection but, thereafter, the state had elicited sufficient testimony to permit the officers to testify. Citing *United States v. Webb*, 115 F.3d 711, 714-15 (9th Cir. 1997), *abrogation recognized in United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), the court stated that the drug courier "testimony was permissible in this case as it served both as a foundation for establishing the basis for expert opinions and to explain the reason the defendant was stopped and arrested even though there were no drugs found in the vehicle in which he was traveling." The trial court found that, because the evidence was properly admitted, counsel had not performed deficiently in failing to object on this ground. The court added that "[e]ven if defense counsel had been able to prevent the admission of the 'heat and load' testimony, the other

evidence against the defendant was sufficient to convict him.” The court found that Ibarra had not established either “prong” of the *Strickland* test.

¶5 In his petition for review, Ibarra reiterates his claim that trial counsel had been ineffective because he had not objected to the improper profile evidence. He contends the trial court erred in denying relief because it misapplied *Lee*. He also argues the trial court applied the wrong standard for determining the prejudice portion of the *Strickland* test. He contends the trial court should have determined whether there was a reasonable probability the outcome would have been different, not whether there was sufficient other evidence to support the guilty verdict.

¶6 Drug courier profile evidence generally consists of “a loose assortment of general . . . characteristics and behaviors used by police officers to explain their reasons for stopping and questioning persons about possible illegal drug activity.” *Lee*, 191 Ariz. 542, ¶ 10, 959 P.2d at 801. Although such evidence may be inadmissible as substantive evidence of guilt, it may be admitted to rebut a defense argument of innocence based on particular profile characteristics. *Id.* ¶ 11. The evidence in *Lee* included the officer’s explicit comparison of the defendant’s specific behaviors—arriving late for the last flight to a known drug destination city and carrying a hard-sided plastic suitcase—with that of known drug couriers. The officer cited the courier profile to explain why she had found the defendant’s behavior suspicious. *Id.* ¶ 13.

¶7 In *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997), cited with approval in *Lee*, the Ninth Circuit Court of Appeals found general testimony that “drug

traffickers do not entrust large quantities of drugs to unknowing transporters” was not improper evidence of a drug courier profile; the court reasoned the evidence had not been admitted to show “Cordoba was guilty because he fit the characteristics of a certain drug courier profile.” *See Lee*, 191 Ariz. 542, ¶ 11, 969 P.2d at 802. Similarly, the evidence here was not offered to show Ibarra’s guilt based on his fitting a drug-courier profile. Rather, the evidence was offered to establish a connection with the “heat” car-“load” car modus operandi. *See Lee*, 191 Ariz. 542, ¶ 11, 969 P.2d at 802; *see also Cordoba*, 104 F.3d at 230 (modus operandi); *Webb*, 115 F.3d at 714-15 (drug courier profile evidence permissible if expert relies on it to establish training and experience and explain theory of how offense was committed)<sup>1</sup>; *United States v. Beltran-Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989) (rebuttal to claim of innocence); *Hall v. State*, 86 S.W.3d 235, 242-43 (Tex. App. 2002) (use of ““heat and load”” theory to establish “connection between appellant and the marihuana in . . . [load] vehicle”).

¶8 Ibarra has not established the trial court abused its discretion when it rejected his argument that counsel had performed deficiently by not objecting to the testimony for reasons other than lack of foundation. The testimony was admissible and there was no reason for counsel to have objected on the ground that the evidence amounted to improper drug courier profile evidence.

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<sup>1</sup>*Webb* is no longer good law as to an unrelated principle of law in light of *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See Hankey*, 203 F.3d at 1169 n. 7.

¶9 Because the record and the applicable law support the trial court’s finding that counsel’s performance had not been unreasonable based on prevailing standards of professional norms, we need not address Ibarra’s contention that the trial court applied an incorrect standard for determining the prejudice portion of the *Strickland* test. When a defendant fails to sustain his burden of raising a colorable claim on either of the two elements of the *Strickland* test, it is unnecessary to determine whether the defendant satisfied that burden with respect to the other element of the test. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶10 We grant the petition for review but for the reasons stated herein, we deny relief.

/s/ *Philip G. Espinosa*

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge

/s/ *Virginia C. Kelly*

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VIRGINIA C. KELLY, Judge